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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOSEPH FARZAM,

Appellant,

v.

TIFFANY CHARCHIAN,

Respondent.

B293972

Los Angeles County
Super. Ct. No. BD588070

APPEAL from an order of the Superior Court of Los Angeles County, Dianna Gould-Saltman, Judge. Affirmed.

Stephen Temko and Dennis Temko for Appellant.

Law Office of Marilyn M. Smith and Marilyn M. Smith for Respondent.

INTRODUCTION

In this marital dissolution action, appellant Joseph Farzam (Husband) challenges an order of the trial court awarding his ex-wife, respondent Tiffany Charchian (Wife), \$75,000 in need-based attorney's fees (Fam. Code,¹ §§ 2030, 2032) and \$25,000 in sanctions (§ 271) for inappropriate litigation conduct. The court ordered Husband to pay those awards at a rate of \$1,500 per month.

Husband does not challenge the basis or the amount of either award, per se. Instead, he argues the court erred as a matter of law in ordering him to pay any amount of Wife's fees or sanctions because, he claims, he cannot afford to pay them. Based on a review of the evidence before the court, which demonstrates Husband's substantial earning capacity as an attorney and the existence of \$1.5 million in home equity, we reject Husband's contention and affirm the awards.

FACTS AND PROCEDURAL BACKGROUND

1. The Marriage

Husband and Wife married in 2002 and separated in 2013. The couple had three sons during the marriage, and they were born in 2004, 2005, and 2007. Husband is an attorney and operates his own law office. Wife has an associate's degree from the Fashion Institute of Design and Merchandising. After the couple married, Wife worked part-time in Husband's office doing secretarial work until she became pregnant with their first child.

¹ All undesignated statutory references are to the Family Code.

She then stopped working outside the home and raised the couple's children.

During the marriage, the couple maintained an upper-middle-class lifestyle financed in part through substantial borrowing. The couple also built a 6,574 square foot home in the Brentwood area of Los Angeles which was, at the time of the proceedings in the trial court, reportedly worth more than \$4.5 million. It appears that the residence was the couple's primary, if not only, significant asset.

2. The Dissolution Action and Property Settlement

Wife filed for divorce in 2013. The parties reached a settlement regarding their property in December 2014. Pursuant to the agreement, Husband retained the family's residence and paid Wife approximately \$1.9 million as an equalization payment. Husband financed that payment by borrowing a substantial sum from his brother secured by a deed of trust on the property.

3. Husband's Civil Suit Against Wife²

In November 2015, Husband (representing himself in propria persona) filed a civil action against Wife asserting claims for assault, battery, malicious prosecution, defamation, invasion of privacy, conversion, trespass, intentional infliction of emotional distress, and negligence. The allegations concerned conduct that purportedly took place in 2013. Husband claimed more than \$10 million in damages.

² Husband's motion to strike portions of the respondent's brief and respondent's appendix, filed on March 25, 2020, is granted.

Wife subsequently moved to enforce the parties' property settlement agreement, which was signed in December 2014 and included a waiver and release of all known and unknown legal claims against each other. Because Husband's claims were predicated on conduct that allegedly occurred before the parties signed the settlement agreement, Wife argued Husband's civil action was barred by the terms of the settlement agreement. The court agreed and entered judgment in Wife's favor in March 2018.

4. Trial Regarding Support Issues

In the marital dissolution action, the court conducted a trial regarding child support and spousal support. The court heard testimony from Husband and Wife, as well as Wife's forensic accountant, Husband's accountant, and the attorney who defended Wife in Husband's civil suit. The bulk of the testimony at trial related to Husband's income and, more particularly, the accounting of moneys taken in by his law firm and held in his client trust account. But because the court's factual findings on those issues are unchallenged in this appeal, we do not summarize the detailed testimony presented.

As to other issues, the court heard testimony that Wife had not been employed consistently since the parties' separation. She represented that she was only able to find part-time work at minimum wage jobs and those jobs interfered with her ability to care for the children. Wife made less than \$1,000 per month working variously as a life coach, healer, or tarot card reader. Wife also received interest payments on loans she made to her father and brother using the equalization payment she received in the property settlement.

For his part, Husband confirmed that at least \$1.5 million in equity existed in the former family residence. But he testified he had not been successful borrowing additional money against the house during two years prior to trial.

5. Support Awards and Final Judgment

Following the trial, the court issued detailed rulings regarding child support and spousal support. As a general observation, the court noted that both parties appeared to be living beyond their means and even beyond the means the couple had during the marriage.

Although Wife was not employed, the court imputed income to her in the amounts of \$2,000 (salary) pursuant to the parties' stipulation, as well as \$1,616 in taxable interest income relating to loans Wife made to family members. The court found Husband had the following sources of monthly income: \$5,416 salary, \$4,423 self-employment income, \$200 rental income, \$693 additional income (based on client trust account analysis), and \$2,300 non-taxable perquisites for a total of \$13,032. The court credited Husband with monthly expenses of \$470 for health insurance, \$1,750 for property tax, and \$2,726 for deductible mortgage interest. In addition, the court found that Wife has custody of the boys 58 percent of the time, while Husband has custody the remaining 42 percent of the time. Based on those findings, the court ordered Husband to pay Wife \$2,140 per month in base child support, plus 15 percent of all earnings over \$12,000 per month, payable quarterly.

The court also ordered Husband to pay Wife spousal support of \$1,000 per month plus 19 percent of all earnings over \$12,000, and up to \$20,000 per month, until November 30, 2020. After discussing the factors listed in section 4320, the court

concluded that Husband has the ability to contribute to Wife's support inasmuch as he has much greater earnings (and earning potential) than Wife.

**6. Award of Attorney's Fees and Sanctions to Wife;
Husband's Appeal**

Wife also filed a motion under sections 2030, 2032, and 271 seeking to recover attorney's fees and costs.

Under sections 2030 and 2032, Wife sought a contribution from Husband for a portion of her attorney's fees based on their relative circumstances. At that time, she had incurred costs and fees of approximately \$145,000. Husband opposed the motion, arguing he could not, after factoring in his support obligation, afford to pay Wife's fees. The court found, as it had with respect to spousal support, that Husband's earnings (and potential for future earnings) far exceed Wife's and that Husband had a larger pool of assets from which to draw for purposes of paying the parties' attorney's fees. The court therefore ordered Husband to pay Wife \$75,000 as a contributive share of her attorney's fees.

Wife also sought sanctions against Husband under section 271 based mainly on his initiation and maintenance of the civil suit against her. Wife sought approximately \$40,000, representing the attorney's fees incurred in defending against the civil action and ultimately obtaining a judgment in her favor. The court found that Husband's "primary purpose in filing the civil action, ... was to recoup the monies that he was paying to [Wife] pursuant to their stipulation settling the property issues[,] for the purpose of harassment[,] or both. None of which was appropriate." The court ordered Husband to pay a sanction of \$25,000 to Wife.

The court ordered Husband to pay the sanction and the contributive share of Wife's attorney's fees at a rate of \$1,500 per month. Husband timely appeals.

DISCUSSION

Husband challenges the court's award of attorney's fees under sections 2030 and 2032 and sanctions under section 271. We address these issues in turn.

1. Standard of Review

Husband contends we should review both the fee award and the sanctions award independently because, in his view, we need only apply established law to undisputed facts. The proper standard of review is well established, however.

We review a trial court's award of attorney's fees (§§ 2030, 2032) and sanctions (§ 271) for abuse of discretion. (*In re Marriage of Schleich* (2017) 8 Cal.App.5th 267, 276 (*Schleich*).) "In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence." (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47, fn. omitted.) "To the extent that a trial court's exercise of discretion is based on the facts of the case, it will be upheld "as long as its determination is within the range of the evidence presented." ' " (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1443.) "The power of the appellate court therefore begins and ends with the determination as to whether the trial court had *any* substantial evidence (whether or not contradicted) to support its conclusions.' " (*In re Marriage of Barth* (2012) 210 Cal.App.4th 363, 372.) "When reviewing for substantial evidence, 'all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in

order to uphold the trial court's finding. [Citation.] In that regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court.' " (*In re Marriage of Berman* (2017) 15 Cal.App.5th 914, 920.)

Thus, " 'the trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' [Citation.]" (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866 (*Keech*)). As the appellant, Husband bears the burden to show the trial court abused its discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

2. The court did not abuse its discretion in awarding Wife \$75,000 in need-based attorney's fees.

Husband contends the court erred in ordering him to pay \$75,000 as a contributive, need-based share of Wife's attorney's fees under sections 2030 and 2032. As noted, the court ordered that amount, together with the \$25,000 sanction award also challenged in the present appeal, payable in monthly installments of \$1,500. Husband does not argue that any portion of Wife's attorney's work was unnecessary nor does he suggest the fees charged were excessive. Instead, Husband claims that the court erred as a matter of law by ordering him to pay any portion of Wife's fees because he cannot afford to do so. We disagree.

In marriage dissolution proceedings, the court must "ensure that each party has access to legal representation ... to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party ... to pay to the

other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (§ 2030, subd. (a)(1).) Section 2030, subdivision (a)(2) requires the court to "make findings on whether an award of attorney's fees and costs ... is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." Section 2032, subdivision (a) in turn requires any award under section 2030 to be "just and reasonable under the relative circumstances of the respective parties." In making that assessment, the court must "take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (§ 2032, subd. (b).)

Section 4320 presents a comprehensive list of factors that a court must consider in making a spousal support award, including, for example, relative present and future earning capacity, the need for retraining or education of one spouse, contribution of one spouse to the career of the other, assets and obligations, and the balance of hardships. (§ 4320.) One court described the process of apportioning the cost of litigation in a marital dissolution action this way: "Reading section 2032 together with section 4320, one cannot escape the idea that a [] fee award should be the product of a nuanced process in which the trial court should try to get the 'big picture' of the case, i.e.,

‘the relative circumstances of the respective parties’ as the statute puts it. (§ 2032, subd. (a).) Conversely, determination of [an] attorney fee order is definitely not a truncated process where the trial court simply (a) ascertains which party has the higher nominal income relative to the other, and then (b) massages the fee request of the lesser-income party into some manageable amount that feels like it will pass an abuse of discretion test.” (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 254 (*Alan S.*).)

Here, the court engaged in the sort of “nuanced process” contemplated by *Alan S.* and, on balance, concluded Husband was better able to bear the cost of the parties’ litigation. The court considered several of the section 4320 factors to be particularly relevant, including the great disparity in the parties’ relative earning capacity (subd. (a)); Wife’s contribution to Husband’s practice and career (subd. (b)); Husband’s ability to pay, taking into account such things as earning capacity, earned and unearned income, assets and standard of living (subd. (c)); the parties’ obligations and assets (subd. (e)); the parties’ age and health (subd. (h)); and the overall balance of hardships (subd. (k)).

Primarily, the court noted that Husband—an attorney—currently has a substantially greater ability to earn than Wife and will likely continue to have far greater earning potential than Wife in the future. Although Husband asserts the court improperly speculated about his future income, the court’s analysis was correct. Section 4320, subdivision (c) requires the court to consider a payor’s ability to pay support “taking into account the supporting party’s *earning capacity*, earned and unearned income, assets, and standard of living.” (*Italics added.*)

“Earning capacity” may be reflected in part by past earnings, as Husband maintains, but courts routinely recognize that future earnings may be, and often are, greater than past earnings. (E.g., *In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 769 [“‘[T]he cases have frequently and uniformly held that the court may base its decision on the [paying spouse’s] ability to earn, rather than his [or her] current earnings ...’ for the simple reason that in cases such as this, current earnings give a grossly distorted view of the paying spouse’s financial ability”]; *Schleich, supra*, 8 Cal.App.5th at p. 294 [award under section 2030 upheld where the record “showed a significant disparity in the parties’ respective income earning capacities”].)

The court’s finding that Husband’s earning capacity is now, and is likely to remain, superior to Wife’s is supported by substantial evidence. Specifically, the record shows that Husband’s law firm has been consistently profitable, notwithstanding Husband’s claim that his practice had been devastated by changes in the areas of maritime and employment law. In addition, the record demonstrates that Husband, who works on a contingent fee basis, may have substantially greater income in some years, as evidenced by a \$600,000 fee he received from a large class action settlement—a fee that largely funded construction of the family home. Finally, there is a substantial disparity between the parties’ education and work experience. While Husband built his law practice, Wife left the work force and raised the parties’ children. As a result, Wife had no significant work experience prior to the parties’ separation and was only able to obtain short-term, part-time, and minimum wage jobs during the pendency of the proceedings. She has self-

trained as a life coach, healer, and tarot card reader but has thus far been unable to earn a living in those pursuits.

Significantly, the court also found that Husband has a greater pool of assets from which to draw for purposes of attorney's fees. We presume the court had in mind the former family home, now owned by Husband, which was reportedly worth at least \$4.5 million at the time of trial and had at least \$1.5 million of unencumbered equity. This too was a proper factor for the court to consider in making its fee award. (§ 4320, subd. (e) [directing the court to consider "[t]he obligations and assets, including the separate property, of each party"].) Husband protests that he cannot "wring more equity out of his house," as his brother (who now owns half the house) will not lend him more money and his attempt to borrow during the trial was unsuccessful. But the court could reasonably assume that, in light of the substantial equity in the home, Husband could borrow the amount needed to pay the fee award.

Notwithstanding the court's analysis, Husband argues the court's award here is not "just and reasonable" because he has no ability to pay Wife \$1,500 (or, apparently, any amount) on a monthly basis. Specifically, Husband asserts that "a trial court abuses its discretion in awarding fees where the payor has no ability to pay" and here, the court's own factual findings indicate that he is unable to afford even his own monthly expenses after factoring in his support obligations. Husband points to the court's order on child and spousal support, in which the court found that Husband's income, including nontaxable perquisites, was \$13,032 and that his expenses, not including child and spousal support, were approximately \$10,000.

Husband's argument suffers from two significant defects. First, as just explained, the court was required to look at more than Husband's current monthly cashflow to assess which party was better able to bear the cost of the marital dissolution action. Husband's narrow focus on only one aspect of his financial circumstances fails to take into account the other substantial evidence supporting the court's decision.

Second, the cases cited by Husband on this point—*Alan S.*, *supra*, 172 Cal.App.4th 238 and *Keech*, *supra*, 75 Cal.App.4th 860—are distinguishable. In both cases, the trial courts erred in large part by assessing ability to pay without taking into consideration the paying party's expenses and other obligations, including the ability to afford one's own counsel. (See *Keech*, *supra*, 75 Cal.App.4th at p. 868 ["the record does not sufficiently reflect, for example, any consideration of the husband's needs to pay his own outstanding legal fees during that period" (italics omitted)]; *Alan S.*, *supra*, 172 Cal.App.4th at pp. 254–255 [rejecting as a "truncated approach" an analysis that failed to take into consideration several of husband's monthly expenses and obligations, as well as his lack of additional assets].) As discussed above, the court here did consider Husband's monthly expenses, obligations, and legal fees.

Further, in both *Keech* and *Alan S.* it appeared, paradoxically, that if the court awarded fees to one party, the paying party might be unable to afford his own fees. (*Alan S.*, *supra*, 172 Cal.App.4th at pp. 251–252; see *Keech*, *supra*, 75 Cal.App.4th at p. 868.) In *Alan S.*, for example, the court ordered husband to pay attorney's fees despite "[husband's] \$800-plus-a-month deficit, apparently financed by credit cards" and failed to take into account "the inability of [husband] to be able to afford to

see his children ...; the apparent fact that [husband] had already spent all of his liquid assets (\$25,000) on an attorney; [and husband's] \$1,800 a month child support payments.” (*Alan S.*, at p. 255.) The court also failed to consider “the total assets of the parties, including whether either [party] has any equity in the houses in which they currently live,” despite a record suggesting they did not. (*Ibid.*) Similarly, the pendente lite fee order in *Keech*, when taken together with the husband’s spousal and child support obligations, tax liability, and \$700 in rent for his one-bedroom apartment, left husband \$93 per month to pay for all remaining living expenses and his own attorney fees. (*Keech*, at p. 867.) The record suggested husband had no equity in real property and “no other source of funds from which the fees could be paid.” (*Id.* at p. 864.) Thus, the monthly deficits at issue in *Alan S.* and *Keech* resulted from expenses that could not—or at least could not easily—be reduced, such as child support obligations or rent on a modest apartment, and the husbands ordered to pay had no additional assets with which to pay the fees ordered. As a result, the lower courts in these cases erred by failing to consider the possibility that their fee awards left the husbands no way of funding basic living expenses and/or their own attorney fees.

Not so here. Even if Husband does not have enough monthly income after expenses to cover the fee award comfortably, Husband has at least some ability to obtain funds, because he has, per his updated income and expense declaration, approximately \$1.5 million in equity in his home, and owes only \$100,000 in combined debt paid in monthly installments of \$1,500. Also, unlike *Keech* and *Alan S.*, Husband is not powerless

to reduce a monthly shortfall—at least to some extent—by adjusting discretionary expenses.

3. The court did not abuse its discretion in imposing sanctions against Husband under Family Code section 271.

Husband also contends the court erred in imposing a \$25,000 sanction against him under section 271. Again, he does not challenge the amount of the award, he simply asserts that he cannot afford to pay it. We reject this argument as well.

Subdivision (a) of section 271 provides: “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney’s fees and costs is not required to demonstrate any financial need for the award.”

“Section 271 authorizes a fees and costs award as a penalty for obstreperous conduct.” (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1520.) “The imposition of sanctions under section 271 is committed to the sound discretion of the trial court. The trial court’s order will be upheld on appeal unless the

reviewing court, “considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.” [Citation.]’ [Citation.]” (*Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142, 1152.)

The court based its award of sanctions on Husband’s litigation conduct, i.e., his filing and maintaining of a civil lawsuit against Wife. As noted, shortly after the parties reached a property settlement, Husband (representing himself in propria persona) filed a civil action against Wife asserting claims for assault, battery, malicious prosecution, defamation, invasion of privacy, conversion, trespass, intentional infliction of emotional distress, and negligence. Husband later claimed more than \$10 million in damages. The court concluded that Husband’s “primary purpose in filing the civil action, ... was to recoup the monies that he was paying to [Wife] pursuant to their stipulation settling the property issues[,] for the purpose of harassment[,] or both.” As Husband does not challenge the court’s rationale for imposing sanctions, we need not discuss it further except to say that the record supports the court’s findings.

Husband contends the court erred in imposing the sanctions because, in the words of the statute, it “imposes an unreasonable financial burden on” him. (§ 271, subd. (a).) We reject this contention for the reasons set forth in the preceding section.

We also comment on Husband’s reliance on *Herriott v. Herriott* (2019) 33 Cal.App.5th 212. In that case, our colleagues in Division Eight of this court declined to impose a sanction under section 3111—a statute that also prohibits a sanction that imposes an “unreasonable financial burden” on the payor

spouse—after concluding that a sanction would be too onerous under the circumstances.³ They did so because the party to be sanctioned had no assets and her only source of income was a \$650 gross monthly social security disability payment. (33 Cal.App.5th at p. 229.) Given that Husband operates a profitable law practice and lives in a house worth at least \$4.5 million in the Brentwood neighborhood of Los Angeles, his assertion that “[t]he *Herriott* decision is applicable here” is unwarranted.

³ Section 3111 concerns confidential child custody evaluations. Subdivision (d) authorizes the court to impose a monetary sanction against any party who discloses a written report in an unwarranted manner. That subdivision further provides that “[t]he court shall not impose a sanction pursuant to this subdivision that imposes an unreasonable financial burden on the party against whom the sanction is imposed.”

DISPOSITION

The order awarding fees under sections 2030 and 2032 and sanctions under section 271 is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.